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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMARY SUIT NO.2828 OF 1998

Mrs. Prabha P. Shenai ...Plaintiff

VS

M/s. Ispat Industries Ltd. ...Defendant

.....

Mr. Prakash Shenai, Constituted Attorney of Plaintiff-in-person.

Mr. U.J. Makhija, a/w. Mr. Ashish Mehta, Ms. Shivani Deshmukh, Ms. Avani Rathod and Ms. Sarbani Chatterjee, i/b. Mr. Ashish Mehta, for the Defendant.

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CORAM : S.C. GUPTE, J.

RESERVED ON : DECEMBER 3, 2015

PRONOUNCED ON : MARCH 9, 2016

JUDGMENT :

. This Summary Suit is filed for a decree in the sum of Rs.1,13,06,769.40 together with interest on the basis of a written contract evidenced by four documents, all in connection with earth filling work carried out by the Plaintiff for the Defendant. Upon unconditional leave to defend being granted to the Defendant, the Defendant contested the suit by filing a written statement. Issues were thereupon framed and oral and documentary evidence was led by the parties. I have heard the constituted attorney of the Plaintiff and learned Counsel for the Defendant. This order disposes of the suit.

2. The Plaintiff claims to be carrying on business in civil

construction works as a proprietress through herself and earlier through her predecessor in title in the name and style of M/s. Sterling Engineering Co. (The references to 'Plaintiff' hereafter include her predecessor in title as well.) It is the case of the Plaintiff that in or around March 1994, the Defendant approached the Plaintiff for earth filling work at Dolvi Village, Pen Taluka, District Raigad in Maharashtra on cubic metre basis. By an offer letter dated 14 March 1994, the Plaintiff submitted a quotation for the work. The quotation was revised after negotiations and discussions between the parties by a letter dated 21 March 1994. By letter dated 25 April 1994, the Defendant accepted the revised quotation and offered the work to the Plaintiff on terms and conditions mentioned therein. The Plaintiff accepted the offer with certain variations, modifications and limitations set out in letter dated 2 May 1994. The Plaintiff, thereafter, mobilised machinery and manpower and started the contract work at the site under the supervision and approval of the site engineer of the Defendant. The Plaintiff raised invoices from time to time. It is the Plaintiff's case that all invoices were duly received and accepted by the Defendant and no objection was raised as to the quality or quantity of the work referred to therein or the rates or amounts claims therein. The Plaintiff claims that after adjusting various sums paid by the Defendant towards these invoices, there is due and payable by the Defendant to the Plaintiff a sum of Rs.1,13,06,769.40, in accordance with particulars of claim annexed as Exhibit "M" to the plaint.

3. These are the bare facts of the Plaintiff's case. There is one more additional aspect of her case. The Plaintiff-Prabha Shenai- claims

to have taken over the assets, book debts and liabilities of the proprietorship firm from its erstwhile proprietor- Prakash Shenai – under a writing dated 30 April 1998. Prakash Shenai is the husband of the Plaintiff. (Incidentally, it was he who appeared as a constituted attorney of the Plaintiff at the trial and at the hearing before me.) One of the issues arising in this suit concerns the entitlement of the Plaintiff to recover the suit dues.

4. The Defendant, in its written statement, apart from contesting the Plaintiff's locus, on the ground of lack of privity, disputes the Plaintiff's entitlement to payment under the invoices, referred to as 'on account bills', on the ground of want of certification of the bills by the Engineer of the Defendant. The Defendant submits that the Plaintiff failed and neglected to perform the contractual obligation of 50000 cubic metres of earth filling per month and barely managed 6000 cubic metres work per month. It is submitted that the work was not completed/done properly; that the work was of poor quality; and that as a result the Defendant suffered damages.

5. On these pleadings, the following issues were framed by my predecessor:

- “1. Whether the Plaintiff is the sole proprietor of M/s. Sterling Engineering Co., entitled to file the present suit.
2. Where there is a privity of the contract between the Plaintiff and the Defendants.
3. Whether the contract between the parties was modified on 02.05.1995 by the parties.

4. Whether the parties performed their reciprocal promises under the contract that prevailed between them.
5. Whether the Defendant validly terminated the contract between the parties.
6. What relief, if any, is the Plaintiff entitled to ?”

6. The Plaintiff produced voluminous documentary evidence. (The documents are marked in evidence as Exhibits 'A' to 'DDD'.) Mr. Prakash Shenai, the former proprietor of the firm Sterling Engineering Co. and constituted attorney of the Plaintiff, was examined by the Plaintiff as her witness. He was cross-examined by Mr. Makhija, learned Counsel for the Defendant. The Defendant relied on the documentary evidence on record, but did not lead any oral evidence.

7. Before I take up the issues for consideration, I must dispose of one particular objection raised by Counsel for the Defendant. The objection was to the authority of the constituted attorney of the Plaintiff to file the suit and appear in it. First of all, an objection was raised on the ground that the power of attorney executed by the Plaintiff in favour of the constituted attorney do not bear serial number in the notarial register. Learned Counsel for the Defendant relied on some judgments of our Court in this behalf. Recording of the serial number on a notorised document bears on proof of the document and its notarisation and not validity thereof. In my view, the execution of the documents before the notary public is sufficiently proved by the Plaintiff through PW1. The proof inspires confidence and the mere absence of serial

number of the notarial register on the documents does not shake the testimony. What, however, learned Counsel really objected to was to the constituted attorney of the Plaintiff appearing at the hearing and arguing her case. He submitted that a non-advocate cannot be permitted to address the Court on the strength of a power of attorney. He submitted that the right to practise in Courts belongs to advocates alone, by virtue of Sections 29, 30 and 33 of the Advocates Act, 1961. This right to practise covers authority to 'act, appear and plead' for the principal or client. Section 32 of the Advocates Act authorizes the court to permit any other person, including the power of attorney holder of a party, to appear, but such appearance cannot include pleading the party's case before the Court. Learned Counsel relied on Order III Rules 1 and 2 of the Code of Civil Procedure in this behalf and also cited the judgments of Andhra Pradesh and Gujarat High Courts in **Hari Om Rajender Kumar v. Chief Rationing Officer of Civil Supplies**¹ and **Jaymal Thakore v. Gujarat State Charity Commissioner, Ahmedabad**² in support of his contentions.

8. Section 32 of the Advocates Act provides as follows :

“32. Power of Court to permit appearances in particular cases.—Notwithstanding anything contained in this Chapter, any court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case.”

Now the question is, whether a person permitted by the Court to “appear” within the meaning of Section 32 of the Act can address the

¹ AIR 1990 Andhra Pradesh 340

² AIR 2001 Gujarat 279

Court and argue the matter. That would depend on what is meant by the word “appear”. The word itself not having been defined in the Act (or, for that matter, even in the Code of Civil Procedure or Rules of our High Court), its meaning will have to be gathered from the context in which it is used. In the Advocates Act, Section 32, which deals with permission to 'appear', comes within Chapter IV titled “Right to Practise”. This Chapter obviously deals with the right to practise the profession of law. Section 29 of this Chapter provides that with effect from the appointed date only one class of persons is entitled to practise the profession of law, namely, advocates. Under Section 30, this right extends to all courts, tribunals or persons authorized to take evidence and authorities or persons before whom advocates are, by virtue of any law, entitled to practise. Section 32 begins with a non-obstante clause. It is clearly an exception to the rule that only advocates can practise law. The court, authority, or person, before whom advocates practise, may in a given case permit 'any person' to appear in any particular case by virtue of this Section. Is it then to be meant that when a person is so permitted, he cannot actually address the Court, authority or person, as the case may be. What purpose will any such 'appearance' then serve? Was it meant to merely provide for 'standing for' the party or 'filing' documents or affidavits, or 'submitting' reply and not for any 'audience' in Court. Civil Procedure Code already has adequate provisions to permit recognized agents of parties to do all this. Order III Rules 1 and 2 permit a party to be represented in any “appearance, application or act” by his recognised agent. Such 'recognised agent' includes a person holding a power of attorney. Section 32 clearly appears to provide for discretion of the Court, authority or person, as the case may be, to

permit any person to actually represent a party by appearing for him or, in other words, allow such person to do everything which the party himself or his advocate, by virtue of Sections 29, 30 and 33, could have done.

9. The Supreme Court in the case of **Harishankar Rastogi v. Girdhari Sharma**³ accepted the entitlement of a party to a proceeding to get himself represented by a non-advocate in a particular instance or case. The restriction insofar as practising of the profession of law in Sections 29, 30 and 33 is concerned, the same stands on an entirely different footing. As the Supreme Court held in that case “practising a profession means something very different from representing some friend or relation on one occasion or in one case or on a few occasions or in a few cases.” The Court put the matter thus:

“4. Having regard to this conspectus of considerations I hold that a private person, who is not an advocate, has no right to barge into Court and claim to argue for a party. He must get the prior permission of the Court, for which the motion must come from the party himself. It is open to the Court to grant or withhold permission in its discretion. In fact, the Court may, even after grant of permission, withdraw it half-way through if the representative proves himself reprehensible. The antecedents, the relationship, the reasons for requisitioning the services of the private person and a variety of other circumstances must be gathered before grant or refusal of permission. In the present case I have noticed the petitioner and his friend who is to represent him, come together with mutual confidence. The party somehow has not shown sufficient confidence in advocates he has come by. This bodes ill for him. I should have suspected the association of the private person as having sinister implications of exploitation of a guideless

3 AIR 1978 Supreme Court 1019

party but suspicion by itself should not be the basis of a conclusion. Therefore, I think it right to give the party, who appears to be unable to represent his own case, an opportunity to present his grievance through his friend. That friend, judging by the note prepared and put in, seems to be familiar with law, although quacks can prove fatal friends. I grant the petitioner permission to be represented by a private person as prayed for, with the condition that if this latter proves unworthy, the permission will be withdrawn.”

10. Even in the case of **T.C. Mathai v. District and Sessions Judge, Thiruvananthapuram, Kerala**⁴, the Supreme Court acceded to the right of persons other than legal practitioners to defend an accused under Section 303 of the Code of Criminal Procedure. Section 303 of the Code of Criminal Procedure entitles a person to be defended by a “pleader” of his choice when proceedings are initiated against him under the Code. Pleader is defined under Section 2(q) of the Code as follows :-

“2(q) “pleader”, when used with reference to any proceeding in any Court, means a person authorised by or under any law for the time being in force, to practise in such Court, and includes any other person appointed with the permission of the Court to act in such proceeding.”

The Court held that the definition of ‘pleader’ in such a case envelopes two kinds of pleaders within its ambit. The first refers to legal practitioners who are authorised to practise law and the second refers to “any other person”. If it is the latter, the essential requisite is that such person should have been appointed with the permission of the court to act in such proceedings. The Supreme Court held these provisions to be “in tune with Section 32 of the Advocates Act, 1961 which empowers a court to permit any person, who is not enrolled as an advocate, to appear

4 1999 Supreme Court Cases (Cri) 455

before it in any particular case.” The Court further held as follows :-

“7. It is not necessary that the “pleader” so appointed should be the power-of-attorney holder of the party in the case. What seems to be a condition precedent is that his appointment should have been preceded by grant of permission of the court. It is for the court to consider whether such permission is necessary in the given case and whether the person proposed to be appointed is capable of helping the court by pleading for the party, for arriving at proper findings on the issues involved in the case.”

Finally, the Supreme Court held that “an agent cannot become a pleader for the party in criminal proceedings, unless the party secures permission from the court to appoint him to act in such proceedings.”

11. Learned Counsel for the Defendant relied on the decisions of Andhra Pradesh High Court in **Hari Om Rajender Kumar** (supra) and of Gujarat High Court in the case of **Jaymal Thakore** (supra). What both Andhra Pradesh and Gujarat High Courts really considered was the question of authority of a recognised agent of a party to plead in a Court of law. Both came to a conclusion that the authority of a recognised agent to make or do any appearance, application or act in any court on behalf of a party, which is provided for by Rule 1 of Order III, does not include the right to plead the cause before the court, that is to say, factually to practise the profession of law. Both Courts in their reasoning relied on a judgment of our Court (per Chagla C.J.) in the case of **Aswin Shambhuprasad Patel v. National Rayon Corporation Ltd.**⁵ In that case, Chagla C.J. held that the expression “appearance, application or act in or to any court” employed in Rule 1 of Order 3 does not include

⁵ A.I.R. 1955 Bombay 262 (Vol. 42, C.N. 65)

“pleading”. The learned Chief Justice held as follows :-

“The right of audience in Court, the right to address the Court, the right to examine and cross-examine witnesses, are all parts of pleading with which O. III does not deal at all. It deals with restricted class of acts in connection with the litigation in Court and it is with regard to that restricted class of acts that O.III permits recognised agents to be appointed.”

None of these judgments is an authority for the proposition that when the Court permits a person to appear for a party under Section 32 of the Advocates Act, the person can only appear and act and not plead for the party. In fact, **Hari Om Rajender Kumar** (supra) was a case where a power of attorney holder asserted his right to plead solely on the basis of the power of attorney, claiming right under Order 3 Rule 1 and 2 of the Code of Civil Procedure, and not as a person permitted to appear for the party under Section 32 of the Advocates Act. The conclusion of Andhra Pradesh High Court was to the effect that the practise before the courts tribunals or authorities can only be by Advocates and not by other persons **unless specially authorised by the courts tribunals or authorities in that behalf**. Andhra Pradesh High Court in **Hari Om Rajender Kumar** (supra) observed as follows :-

“It is, therefore, clear that the provisions of O. 3, R. 1 which permit appearance, applications or acting in any Court are subject to any other law and this includes the provisions of the Advocates Act, 1961 and in particular, Ss.32 and 33. It is further clear that so far as the signing or verifying or doing other acts are concerned, these could be done by the Power of Attorney duly authorised therefor but so far as appearing or practising in Court are concerned, they are subject to the provisions of Ss. 32 and 33 of the Advocates Act. The right to

appear in Court and plead for a principal as also the right to practice in Courts have to be distinguished from the other acts, which a power of attorney can perform under 0.3, R. 1, C.P.C. So far as the right to appear and plead for a principal in Court as also the right to practice are concerned, these are governed by Ss. 32 and 33 of the Advocates Act.”

These observations of Andhra Pradesh High Court have also been accepted as a correct statement of law by Gujarat High Court in the case of **Jaymal Thakore** (supra).

12. In the present case, considering the fact that the constituted attorney in the present case is not only the husband of the plaintiff but her predecessor in title, who actually carried out the work in question and to whom the amounts claimed in the suit were due before he assigned his entitlement to the plaintiff, there is a pre-eminent case for permitting him to represent the plaintiff and argue her case in this suit. I have, accordingly, permitted him to advance arguments for the Plaintiff.

13. Let me now consider the question of locus of the Plaintiff or, in other words, the question of privity insofar as the suit claim is concerned. The firm of Sterling Engineering Company was originally a Proprietorship of the Plaintiff's husband, when the suit contract was performed and the suit claim arose. The original proprietor, thereafter, by a deed of partnership dated 23 April 1998, entered into a partnership with the Plaintiff herein. (This deed is proved by PW1 and admitted in evidence as Exhibit VV.) The proprietorship business of the Plaintiff's husband was taken over by the partnership. By another indenture, described as Indenture of Dissolution and Take-over, the partnership was dissolved with effect from 30 April 1998 and the Plaintiff herein took

over the running business of the partnership along with all its assets and liabilities. (The document of 30 April 1998 is proved by PW1 and admitted in evidence as Exhibit WW.) That is how the Plaintiff claims to be entitled to file this suit in her name and recover the suit claim. Learned Counsel for the Defendant submits that the suit claim is in not the nature of a chose in action and there cannot be any assignment of it in favour of the Plaintiff.

14. Any debt, other than a debt secured by mortgage of immovable property or hypothecation or pledge of movable property or any beneficial interest in movable property not in the possession, which a Civil Court recognizes as affording grounds for relief, is an actionable claim. It is also termed in English Law as a 'chose in action'. Section 130 of the Transfer of Property Act provides for transfer of an actionable claim. Such transfer is to be effected by execution of an instrument in writing signed by the transferor. Upon such transfer all rights and remedies of the transferor vest in the transferee. The transferee may then sue the debtor on such actionable claim in his own name and without obtaining the transferor's consent or making the latter a party thereto. The two writings, Exhibits VV and WW, duly transfer the debt, which the original proprietor had in respect of his dues owed by the Defendant, to the Plaintiff, first as a partner and later as a successor and assignee upon dissolution of the partnership.

15. Learned Counsel for the Defendant submitted that what the original proprietor had was a right to claim damages and this was not an 'actionable claim', but a mere right to sue and it could not be

transferred by virtue of Section 6 (e) of the Transfer of Property Act. He relied upon judgments of our Court in the case of **Hirachand Amichand Gujar v. Nemchand Fulchand Marwadi**⁶, of Nagpur High Court in case of **Mt. Nakhela v. Kokaya**⁷, **Punjaram Mali v. Harisao Rangari**⁸ and **Mt. Powri v. Shiwa Paiku Mahar**⁹, and of Allahabad High Court in **Moti Lal v. Radhey Lal**¹⁰ in support of his contentions. As held by our Court in **Hirachand Amichand's** case, a mere right to sue for damages for tort or breach of contract cannot be assigned. It is a right personal to the party aggrieved and not an actionable claim or debt. The distinction between an actionable claim and a mere right to sue is that whereas an actionable claim is a debt of a liquidated sum, a mere right to sue seeks to recover an unliquidated sum by way of damages which becomes due only when the Court accepts the claim. The distinction is well illustrated by the Privy Council in **Manmatha Nath Mullick v. Sheikh Hedait Ali**¹¹. That was a case where a lessee had covenanted with the lessor to pay the government assessment on the land or in default be liable to the lessor in damages. The lessor sold the reversion and also assigned his right to recover from the lessee the installments of assessments which the former had paid owing to the lessee's default, to the plaintiff. The High Court held the assignment to be void as an assignment of a mere right to sue. The Privy Council reversed the decision, holding that the lessee's failure to pay did not give rise to a claim for damages within the meaning of the clause in the lease, but a claim for reimbursement of the precise sum the lessor had paid to meet the obligation. The Privy Council held the

6 A.I.R. 1923 Bombay 403

7 A.I.R. 1923 Nagpur 67 (2)

8 A.I.R. 1934 Nagpur 268

9 A.I.R. 1935 Nagpur 2

10 A.I.R. 1933 Allahabad 642

11 A.I.R. 1932 Privy Council 32

assignment to be of an actionable claim. Just as a claim of a vendor to recover price of goods sold and delivered is a debt and not a claim for damages, a contractor's claim for recovery of the contract remuneration for goods supplied or services rendered would be a debt to recover a liquidated sum, namely, the remuneration reserved by the contract. The right to such remuneration can be assigned; it can be inherited; it also can be vested in the official assignee in case of an insolvency. The judgments of **Hirachand Amichand**, **Mt. Nakhela**, and **Punjaram Mali** are rendered in cases where the right assigned was a mere right to sue for damages for breach of contract. In **Hirachand Amichand**, the plaintiff claimed to be the assignee of a right to recover loss occasioned by the defendant's failure to take delivery of goods, whereas in **Mt. Nakhela** the claim was in respect of certain articles lent, but not returned and the lender of the goods had a personal right to recover money towards damages. In **Punjaram Mali**, it was a claim for compensation for breach of contract to buy immovable property. Even the cases of **Mt. Powri** and **Moti Lal** were cases where the right assigned was the right to recover damages being unliquidated sums. Both Nagpur and Allahabad High Courts held that a claim for unliquidated damages was not an actionable claim, and that only when a debt is of an ascertained sum, the same can be assigned as an actionable claim. In the present case, the claim is a claim by a contractor for remuneration for work done under a written contract, which provided for an ascertained rate for work done and is a claim for an ascertained sum. Just because there is a dispute as to whether or not the work is done, it cannot be termed as an unliquidated claim by way of damages. It is certainly an actionable claim capable of being assigned.

16. There is one more reason why the claim can be assigned. When the whole business of the proprietorship was taken over, along with all assets and liabilities, as a going concern by the partnership, all rights including the right to recover even damages or compensation for loss caused to the firm would stand transferred to the partnership. Ditto for the business of the partnership taken over by one partner upon dissolution. Where a property is transferred along with the right to recover damages or compensation in respect of that property, the assignment of the right is valid and not hit by clause (e) of Section 6 of the Transfer of Property Act. (See **Murlidhar Agarwalla v. Rupendra Mitter**¹².) The situation is like when a company, which is a plaintiff in a pending suit for damages, is amalgamated with another company. The right to be substituted as plaintiff is not hit by clause (e) of the Section 6. (See **New Central Jute Mills Co. Ltd. Vs. Rivers Steam Navigation Co. Ltd.**¹³) The reasons for this are very succinctly stated in the case of **New Central Jute Mills Co. Ltd.**(supra) by Calcutta High Court. The relevant observations are quoted below :-

“(9) In my opinion, even if the transfer is regarded as one directly by Albion Jute Mills Co. Ltd., it is not hit by sec. 6(e) of the Transfer of Property Act. That section provides that a mere right to sue cannot be transferred. It is necessary to remember and stress the word 'mere'. Transfer of a bare right to sue and of nothing else is prohibited. Property with an incidental right to sue for damages may be transferred.

(10) Now, an undertaking or business as a going concern is property, A right to sue for damages for breach of contract

12 AIR 1953 Cal. 321

13 AIR 1959 Cal. 352

appertaining to the business is intimately connected with the enjoyment of the business and is an important item of its assets. The assignee of the business takes it with all rights appertaining to it. The transfer of the incidental right to sue for damages together with the business is not a transfer of 'a mere right to sue'. ”

17. The Plaintiff is, thus, clearly entitled to sue in her own name and recover the suit claim. The Defendant can have no objection on the ground of her privity to the debt or otherwise. Issue Nos. 1 and 2 are, thus, answered in the affirmative, in favour of the Plaintiff.

18. Learned Counsel for the Defendant also raised an objection on the ground that the original contracting party, which dealt with the Plaintiff, was Nippon Denro Ispat Ltd. (when the offer was made) and Ispat Industries India Ltd. (when the acceptance was conveyed); the name of Ispat Metelics India Ltd., was changed during the pendency of the suit to 'Ispat Industries Ltd; and that subsequently, by a scheme of amalgamation sanctioned by the Court, 'Ispat Industries Ltd.' merged with or stood transferred to "JSW Ispat Steel Ltd." It is submitted that though the first change of name, i.e. from Ispat Metelics India Ltd. to Ispat Industries Ltd., was effected in the cause title, the subsequent change post amalgamation is not effected in the cause of title. This is neither here nor there. The liabilities of the merged or transferred company or undertaking, namely, Ispat Industries Ltd., stand transferred to JSW Ispat Steel Ltd. and it is the latter which must answer the claim, whether or not the change of name is effected in the cause title. In any event, there being no dispute as to take-over of the liabilities of Ispat Industries Ltd. by JSW Ispat Steel Ltd., I am inclined to permit the

Plaintiff to carry out an amendment by substituting the name of the Defendant as “JSW Ispat Steel Limited”, to obviate any difficulty on this score.

19. That brings me to the merits of the Plaintiff's claim. Issue Nos. 3, 4 and 5 concern this claim. They can actually be combined to consider whether the Plaintiff actually carried out the work as claimed in the R.A. Bills and whether the Defendant is liable to pay for the same. Issue No.3 concerns the effect of the Plaintiff's letter dated 2 May 1995 vis-a-vis the suit contract, particularly whether the contract was modified thereby. As I have shown below, the letter of 2 May 1995 merely reiterates what was already agreed upon between them and throws light on their understanding of it. It is, therefore, not really necessary to consider whether or not this letter forms part of the contract. The obligation of the parties and performance thereof, which form part of Issue No.4, are matters which are discussed below. As far as Issue No.5 is concerned, namely, whether or not the contract was validly terminated by the Defendant, again, it is not really necessary to decide the same. The Plaintiff has not made any claim for loss occasioned to her by reason of termination of the contract. So also, there is no counter-claim by the Defendant. What we are really concerned with in this suit is the remuneration payable to the Plaintiff for work done under the contract and not damages for wrongful termination. Indeed, neither party addressed the Court on this issue at the hearing.

20. As I have explained below, the contract was mainly for supply of earth and filling of the same at the site so as to bring the

ground level above water. There is evidence on record that earth was supplied by the Plaintiff for filling at the site. The question is, how much quantity. The Plaintiff claims to have sent invoices, which were checked and accepted. The Defendant disputes the quantity of the work claimed by the Plaintiff. It is submitted that there is no certification of the work by the Engineer of the Defendant. It is submitted that the certification was not done because the earth filling work had not been compacted properly, questioning thereby the quality of the work. Learned Counsel for the Defendant also submitted across the bar that the suit contract required the Defendant not only to fill the land by earthwork, but level it and that payment cannot be claimed without such leveling, though there is no such plea either in the written statement or any of the correspondence relied upon by the Defendant. What, however, emerges is that there was an issue as to 'compaction' of the earth brought to the site of land fill.

21. First let me deal with the issue of certification. The main plank of the defence is that without certification no payment can be demanded. The terms offered originally, and revised after discussion between the parties, by the Plaintiff provide for an initial payment of advance and later payments according to the bills submitted by the Plaintiff. The Defendant's letter of 25 April 1994 offering the contract work to the Plaintiff provides for (a) an interest free mobilization advance of Rs.11,10,300/- against bank guarantee (with stipulation to adjust the advance pro-rata from each 'on account' or 'R. A.' Bill), (b) 60 per cent of on account payment within 10 days of receipt of the bill after preliminary checking of the bill, and (c) balance amount after detailed

checking and certification of the bill within 20 days thereafter. There is also a provision for a final bill, which is to be paid within 90 days from the date of submission. The Defendant's letter of 25 April 1995 is followed by the Plaintiff's communication of 2 May 1995, which reiterates that 60 per cent of the R. A. Bill would have to be paid within 10 days and balance amount within next 20 days. In his deposition, PW 1 has maintained this position. From the material available on record, it is reasonable to draw a conclusion that whereas certification is linked to the payment of balance 40 per cent payment of an R. A. Bill, the same cannot be said to be a condition of such payment. In any item rate contract (and this was such contract), payment is due for the quantity of work done by applying the item rate. Though any employer would insist on certification before final payment of any R. A. Bill, if for some reason, which is not attributable to the contractor, the Engineer does not certify the Bill, the employer is not absolved of the liability to pay for the work done. It would still be for the Court to determine what was the quantity of work done, based on evidence on record, and then order appropriate payment.

22. Before I do so, let me deal with the Defendant's argument that since there was no compacting done of the earth work at the site, there is no liability on the part of the Defendant to pay for the work. This again is a matter of interpretation of the contract. The scope of the work, according to the contract, was as follows:

“1.1 Earth work filling for site grading brought from outside, of required quality, spreading in layers, levelling and dressing the slopes, watering in

layers, levelling and achieving compaction, as per enclosed specifications and directions of the Engineer/Employer.”

There is evidence on record that this work involved (i) cutting or excavating of earth from high areas in all types of soil, (ii) transporting the excavated earth to the site of land-fill, (iii) spreading of the earth dumped at the site and (iv) leveling the earth finally after compacting the same at the site. The bills drawn by the Plaintiff set out these particulars. These bills are admitted in evidence (Exhibits E to N). Though these were duly accepted by the Defendant, the particulars of the work mentioned therein were not questioned at any time. (Of course, whether or not any particular feature of the work was actually accomplished is a matter of debate, which I have dealt with below.) Second important point to note is that the payment was to be on a cubic meter basis, i.e. the quantity of filling done by earthwork at the site. Thirdly, there is the Plaintiff's evidence (examination-in-chief of PW 1, Question Nos. 41, 155, 182, 183, 186, 226 and 254 including others in the cross examination of PW 1 and the letter of 2nd May 1994 – Exhibit D) that the work was mainly to fill up the sea water by supply and spread of earth work done by excavator, dumper, etc. Then, there is the oral evidence of PW 1 (Questions 40, 41, 143, 144, 145, 147, 155, 161, 181, 182, 183, 187, 189, 190, 226, 254 to 257, 290 and 295), which shows that the land-fill site was a 1200 acre plot taken by the Defendant from the Government for its steel plant; that most of the plot had back-water of the Arabian Sea having a depth of about 5 meters and above; that the contractors (there were other contractors also engaged for a part of the total quantity of work) were expected to fill the earth in the water

and bring the same up to the level of about 2 meters above the sea water level; that the required earth (for filling) was to be brought by cutting a hill nearly 12 kms away by using excavators and then transporting the earth in dumpers to the land-fill site and dumping the same there; and that after the level of filling came above the sea water by two meters, water had to be sprayed and the earth was to be compacted with the use of road rollers. There is no contrary evidence produced by the Defendant. It has not examined any witness, but simply chosen to rely on documents on record. The evidence clearly establishes that there is no question of compaction of the earth brought to site unless the filling came above the sea water level. Till that stage was reached, the contractor had to simply excavate the earth from hilly areas and transport and dump the same at the site. Naturally, the initial R. A. Bills would involve quantities of earth dumped this way at the site. There is no question of the Engineer refusing to certify these R. A. Bills for want of compaction of earthwork at site. Out of the total earth to be supplied at the site, namely, 3,00,000 cum., the Plaintiff claims to have supplied over 1,22,000 Cum. There are in all 10 R. A. Bills submitted for this work. At that stage, the contract was terminated by the Defendant. By then, the earth level had come up 2 meters above the sea water only for a few sq. meters. There is evidence on record (Questions 186, 258, 290 and 293 of the cross – examination of PW 1) that about 50 sq. mtrs. of area was actually compacted by the Plaintiff. There is also evidence (Examination-in-Chief, para 15) that compaction tests were carried out at site, samples were sent to P.W.D. Department of Government of Maharashtra and there was certificate to that effect. (There is no contrary evidence on record.) All this establishes that compaction could not have been considered before the earth filling

came upto a certain level, and whenever it did come to that level, the compaction had been done according to the requirement of the contract. In the premises, there was no question of the Defendant holding up any payment of the Plaintiff on the ground of want of compaction.

23. That only leaves the question of actual quantity of work done by the Plaintiff. The Plaintiff has led evidence of the work in the form of (i) bills, which were duly received and accepted by the Defendant, (ii) documentary evidence of having satisfied the Defendant about the quantities, *inter alia*, by producing royalty receipts of the Collector evidencing payments to the Collector as royalty for earth excavated, (iii) oral evidence of PW 1 in support of the quantity of work executed and correctness of the bills raised, and (iv) various written communications about pending dues contemporaneously sent by the Plaintiff to the Defendant. Except for stating that there was no compaction and hence, no certification of the quantity, there is no demur on the part of the Defendant to the bills raised and letters addressed by the Plaintiff. There is no oral or documentary evidence produced by the Defendant to counter the Plaintiff's evidence.

24. In the premises, a fair conclusion can be drawn from the evidence on record that the Plaintiff has proved the supply of earthwork referred to in the R. A. Bills raised. The quantity comes to 1,22,200 Cum. Insofar as the rate is concerned, it is a matter of contract. The rate payable was Rs.71 per Cum. All R. A. Bills have been duly raised reflecting the quantity of work done and the rate payable for the same. The Plaintiff has, thus, proved that all ten R. A. Bills were payable.

25. The question is now of interest that may be charged by the Plaintiff. Admittedly the contract is silent on interest. The Plaintiff's case is that the interest was stipulated under the R. A. Bills raised by the Plaintiff on the Defendant. An R. A. Bill would not reflect a contractual stipulation. It is rather a unilateral demand. It cannot be made the basis of any claim for interest. The pre-suit interest could, in that case, be claimed only under the Interest Act. The Plaintiff admits that there was no notice served by her under the Interest Act. In that case, no interest could be claimed for the suit claim till the date of the suit. It will, however, be in the discretion of the Court to award *pendente lite* interest on the amount of R. A. Bills due as at the date of the suit. The principal amount due at the date of the suit is Rs.54,10,708/-. A simple interest at the rate of 9 per cent per annum would be a conservative estimate of an average rate of interest payable from the date of the suit till this date. That works out to Rs.86,43,606/- for the period between June to March 2016.

26. In the premises, the Plaintiff is entitled to a decree for the sum of Rs.140,54,314/-. Considering the interest rate structure at the date of the decree, a further interest at the rate of 12 per cent per annum may be in order for a period of 3 months from today to enable the Defendant to clear the dues within a reasonable period. Thereafter, a higher rate based on commercial rate can be awarded on the dues. That would be 18 per cent per annum.

27. Accordingly, the Plaintiff's suit is decreed as follows:

(i) The Plaintiff is permitted to amend the cause title by substituting the name of the Defendant as “JSW Steel Limited”. Such amendment be carried out within two weeks from today.

(ii) The Defendant is ordered and decreed to pay a sum of Rs.1,40,54,314/- with interest at the rate of 12 per cent per annum from the date of the decree on the principal amount of Rs.54,10,708/- till payment or realization for a period of three months and thereafter at the rate of 18 per cent per annum.

(iii) The Plaintiff is awarded the costs of the suit.

(S.C. Gupte, J.)